DEC 28 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 659

L. R. AGUINALDO, INC., et al.,

including

HONGKONG & SHANGHAI BANKING CORPORATION,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner (Hongkong & Shanghai Banking Corporation), on its own behalf and also on behalf of its 17 co-plaintiffs in the above entitled action,[1]

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[1] The opening paragraphs of the October 2, 1956, opinion (Appendix B hereof) of the Court of Claims hereby sought to be reviewed recite that the above captioned action was "filed on behalf of The L. R. Aguinaldo, Inc. and seventeen other plaintiffs, including the Hongkong & Shanghai Banking Corporation", all of whom "had an interest in the cargo on board the S. S. *Capillo*" at the times here in question, but that "only the claim of the Hongkong & Shanghai Banking Corporation is presented to the Court at this time." Consequently, the present judgment below merely ordered dismissal of the petition "as to the claim of Hongkong & Shanghai

prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on October 2, 1956.

Citation of Opinions Below

The report of the Commissioner of the United States Court of Claims relative to this matter, filed on December 5, 1955, has not been officially published. It is printed as Appendix A hereto, infra, pp. 21-28.

The opinion of the Court of Claims, and its Findings of Fact and Conclusion of Law (October 2, 1956) likewise are presently unreported and are printed as Appendix B hereto, infra, pp. 29-40.

A motion by the plaintiffs to amend the Court's Findings of Fact, the defendant's answer to said motion and the Court's order thereon are printed as Appendix C, infra, pp. 41-46.

Jurisdiction

The opinion of the Court of Claims, together with its Findings of Fact and Conclusion of Law, is dated October 2, 1956. The order denying plaintiff's motion to amend the Findings of Fact is dated Decem-

Banking Corporation". However, as the Commissioner had previously found, a decision as to the two claims of the Hongkong & Shanghai Banking Corporation presented for determination "will be largely determinative of the claims of 17 co-plaintiffs representing their losses of cargo aboard the *Capillo* as enumerated in 61 bills of lading" (p. 21, infra). This Finding of Fact was adopted and repeated by the Court (Finding 1b, p. 34, infra). In actuality, the breadth and the basis of the decision below are clearly such as to be completely dispositive of the claims of the other 17 co-plaintiffs; but no formal judgments of dismissal of such other claims have as yet been entered in the Court below.

ber 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1255.

Questions Presented

In order the better to demonstrate the actualities of the issues of law raised by the decision below, we are expressing the questions here presented for review in the exact and specific "terms and circumstances of the case" in literal compliance with the wording of Rule 23(1)(c) of this Court. Such particularization, we believe, still leaves it manifest that broad and fundamental principles of great and general importance in the field of constitutional law are here in issue.

As thus expressed, the questions here presented are:

1. Whether the exercise by the U. S. naval authorities at Manila of complete dominion over the S. S. *Capillo* and her cargo under the conditions of active hostilities prevailing there in the latter part of December, 1941, (1) by refusing repeated requests of her Master for permission to leave the Manila area as other merchant vessels were permitted to do during the same period and (2) by thereafter ordering her to anchor off Fort Mills at Corregidor for the purpose of discharging her cargo there, at which place she and her cargo were shortly thereafter destroyed (as was reasonably to be expected) by enemy bombing, did not constitute, as a matter of law, a compensable taking of private property within the meaning of the Fifth Amendment when the reason for such detention in the area of active hostilities and for the vessel being ordered to Corregidor was the

announced purpose of removing the cargo and *making it a part of the stores* of the United States Army there.

2. Whether physical removal of the wanted cargo from the *Capillo's* holds by the military authorities was necessary in order to make the Government liable for a "taking" within the meaning of the Fifth Amendment (as the Court of Claims here held).

3. Or whether the cargo owners were not deprived of their property within the meaning of the Fifth Amendment when "the *Capillo* was ordered by the Navy to move to Fort Mills at Corregidor" and with the risk of loss transferred to the Government while she was waiting at anchor "just off the Fort", as directed, after her Master had been advised by Commander Portz, then on Corregidor, "that he wanted the *Capillo's* cargo and would send lighters out to unload it at its place of anchorage".

4. Whether, merely because destruction by enemy bombing was the final, or immediate, cause of the loss of the *Capillo's* cargo, the instant case is controlled (as the Court of Claims apparently considered) by the dictum in *U. S.* v. *Pac. R. Co.*, 120 U. S. 227, that "the destruction or injury of private property in battle, or in the bombardment of cities and towns * * * had to be borne by the sufferers alone as one of its consequences", which was declared to be the "law today" (1952) by the majority of this Court (as then constituted) in *U. S.* v. *Caltex, Inc.*, 344 U. S. 149, at pp. 153-4.

5. Or whether such a situation as is here involved is not an exception thereto (a) in that the acts of con-

trol by the Naval authorities at Manila over the cargo (which was wanted by them for military use in the prevailing war-time emergency) were of such nature as to have vested in the owners thereof a claim for just compensation by reason of their having been deprived of their property before its destruction by enemy bombing and/or (b) in that the loss of the *Capillo* and her cargo was merely a direct and expectable consequence of the vessel having been ordered by the U. S. Naval authorities (i) to proceed to Corregidor and (ii) to stay at anchor off Fort Mills until her wanted cargo could be landed there.

6. Whether, since the *Capillo* had been singled out from other merchant vessels (which "had been permitted to leave during the same period") by being detained in the area of active hostilities "because the military authorities wanted much of its cargo", such a situation is not clearly outside the scope of the loss-by-enemy-action rule applied here by the Court of Claims and, instead, one falling squarely within the equitable principle adverted to in the dissenting opinion in the *Caltex* case, supra, that "Whenever the Government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss".

Constitutional Provision Involved

The Constitutional provision involved is that part of the Fifth Amendment to the Federal Constitution which provides:

> "* * * nor shall private property be taken for public use, without just compensation."

Statement of the Case

This action against the United States was instituted in the Court of Claims by the owners (18 in number) of cargo which was on board the S. S. *Capillo* in December of 1941 and seeks to recover just compensation for the taking by defendant of such cargo prior to its destruction by Japanese bombers on December 29, 1941, while the vessel was lying at anchor off Fort Mills on Corregidor, as directed by the U. S. Naval authorities, waiting for lighters to be sent out to unload her cargo which Commander Portz had "declared that he wanted" (p. 37, infra). The jurisdiction of the Court of Claims over both the subject matter and the parties, including your petitioner (see Court's Findings 2 and 3, p. 34, infra), is clear and unquestioned. (28 U. S. C., Sec. 1491 (1).)

The following is a summary of the material Findings made by the Court below:—

On October 18, 1941, the *Capillo*, a merchant vessel owned by the U. S. Maritime Commission and then under charter to the American Mail Line for operation, sailed from Astoria, Oregon, with a cargo consisting principally of flour, canned milk, cigarettes and lumber. Her first scheduled port of call originally was Shanghai; but, pursuant to Government instructions, she proceeded first to Honolulu, whence she was directed by the Navy to proceed to Manila via Port Moresby and Torres Strait. Upon arrival at Manila on November 28, 1941, her Master reported to the Naval authorities, who informed him that, pending further orders, the *Capillo* should remain at anchor in Manila Harbor.

On December 8, 1941 (Manila Time), the Master was advised by Navy officers of the outbreak of war with Japan and was instructed to go outside the harbor and anchor. Eight days later her Master felt compelled to move the *Capillo* back into Manila Harbor because his crew was becoming unruly.

No contention is made by your petitioner or by its co-plaintiffs that any of the various orders and instructions above referred to were other than routine practice at that particular time. The foregoing summary, in other words, has been given merely to afford factual background.

On December 16, 1941, after the vessel's return to the inner harbor from the outer anchorages, a "Navy officer boarded her and advised the captain that the discharge of her cargo was desired as soon as possible" (p. 36, infra).

An Army officer also boarded the vessel on the same day and advised the captain that the Army desired the lumber on board the vessel (p. 36, infra). On the following day, the Army sent lighters alongside and discharge of the deckload of lumber was begun. This work of removing the deck cargo continued through December 24, 1941 (p. 36, infra), on which date Manila was declared an "open city" (p. 36, infra). The claim for the lumber which was thus removed was subsequently paid by the United States and, consequently, is not involved in this litigation.

Early the next morning, i. e. on December 25th, "the *Capillo* was ordered by the Navy to move to Fort Mills, at Corregidor, which it did, anchoring "just off the Fort" (p. 37, infra). By then, "supplies for

the defending forces were precariously short. Anticipated supplies had not arrived. A heavy demand existed for almost all commodities of military utility". (Finding 10, pp. 36-37, infra.) In addition to the lumber (some of which was still on board—p. 36, infra), the flour and other items of the cargo still on board the *Capillo* were of definite military use. (See Commissioner's Finding 17, p. 27, infra.) Among the cargo in which your petitioner was interested was a shipment of 8,000 sacks of flour invoiced for $14,077.45. (Commissioner's Findings 15 and 16, p. 26, infra.)

"Emergency conditions existed in Manila throughout and following this period.* * * Intermittent enemy bombing and strafing of targets in Manila Harbor and port facilities had also occurred." (Finding 10, pp. 36-37, infra.) On December 24, 1941, Manila had been declared an "open city" by General MacArthur (p. 36, infra). As noted above, the *Capillo* moved to Corregidor early the following morning as then ordered by the Navy (p. 37, infra).

On December 29th, the Master of the *Capillo* "feeling excessively vulnerable to enemy attacks at his anchorage off Fort Mills", consulted U. S. Navy Commander Portz, then on Corregidor, as to the possibility of moving "to an anchorage more sheltered from enemy bombing" (p. 37, infra). During this conference, the Master "was asked by Portz if the *Capillo* could discharge its cargo on the dock at Fort Mills. On learning from the Master that this could not be done because the dockside water was too shallow, Portz declared that he wanted the *Capillo's* cargo and would send lighters out to unload it at its place of anchorage." (Findng 12, p. 37, supra.)

At about Noon that day (December 29th), while waiting at the anchorage off Corregidor for the U. S. Navy to send the lighters needed to transfer the wanted cargo to the dock at Fort Mills, the *Capillo* was hit by two enemy bombs and set on fire. "It is safely presumed that the *Capillo* was sunk and that the cargo, documents, orders, logs, etc., were destroyed" (p. 38, infra).

"On many occasions the Master requested permission of the Navy authorities for the *Capillo* to leave the Manila area, but was refused. Other ships in the Manila area had been permitted to leave during the same period, some managing to reach safe havens in Australia and elsewhere. It is probable that the *Capillo* was detained in the area because the military authorities wanted much of its cargo * * *." (Court Finding 14, p. 38, infra), or, as found by the Commissioner, who had actually heard the witnesses: "From all the evidence it is reasonable to conclude that the *Capillo* was detained in the area because the military authorities wanted much of its cargo * * *" (p. 25, infra).

The Court of Claims, nonetheless, dismissed your petitioner's claim for just compensation for its having been deprived of its property by the various actions taken by the Naval authorities at Manila in dealing with the *Capillo* and her cargo during the latter part of December, 1941, and/or as the expectable, if not inevitable, result of such exercise of control. In so holding, it stated, *inter alia:*

> "* * * the military authorities no doubt wanted to remove at least the flour and the canned milk, and perhaps also the cigarettes, if they could; and

had they done so, they would have no doubt appropriated these articles to the use of the Army or Navy. However, they did not remove it, and, hence, there was no actual appropriation of the articles for which the Hongkong & Shanghai Banking Corporation sues.

Refusal of permission to leave the area, under the circumstances then existing, did not amount to a taking. (p. 32, infra.)

* * * *

Even a definite intention to take her cargo does not amount to a taking, unless the taking is accomplished. (p. 33, infra.)

* * * *

The cargo was not appropriated to the use of defendant; it was destroyed by enemy action. For this defendant is not liable, even though the vessel might have escaped with her cargo, had permission to leave been granted." (p. 33, infra.)

We believe that it will aid this Court in making a correct appraisal of the instant situation if we here direct special attention to certain other portions of the opinion in the Court below. The inaccuracies therein require consideration and correction, not merely because they distort the factual situation, but, more importantly, because they constitute an integral part of the line of reasoning which led the Court below to its ultimate conclusion of law as to lack of liability on the part of the government for the actions taken by the military authorities at Manila in dealing with the *Capillo* and its cargo.

1. In a recital of the movements of the *Capillo*, it is stated in the opinion below that "she arrived in

Manila on October 28, 1941" (p. 30, infra). As found by the Commissioner, her actual arrival date there was November 28, 1941 (Commissioner's Finding 6, p. 23, infra; taken over as Court Finding 6, p. 35, infra). That the word "October" in the opinion is not just a typographical error for "November" is made clear by the time computation set forth at the end of the same paragraph of the opinion where it is stated that the Japanese "did attack on December 7, 1941, about one month and ten days after her arrival in Manila" (p. 30, infra).

2. This same error as to time period is repeated later in the opinion where it forms the basis for an argumentative inference by way of rebuttal to conclusions in support of your petitioner's position. Thus the opinion states (pp. 31-32, infra):

> "* * * much of the cargo of this vessel was of military value, and the Navy may have denied permission for her to leave because it wanted her cargo. However, if the latter had been the reason, it would seem she would have been ordered to discharge her cargo shortly after arrival, instead of having been required to remain at anchor in the harbor for more than a month."

It should also be noted that, in addition to the time element error, the last sentence in the foregoing passage in the opinion not only finds no support in any of the Commissioner's Findings of Fact (Appendix A hereof), but, in reality, is a material modification, or in the nature of an evasion, of Court Finding 14 (p. 38, infra), which had already toned down Commissioner's Finding 14 (p. 25, infra), as has been detailed at p. 9, supra.

Still other inaccuracies are inherent in that part of the foregoing argumentative inference made by the writer of the opinion that if the Navy had wanted the cargo, "It would seem she would have been ordered to discharge her cargo shortly after her arrival" (pp. 31-32, infra). For one thing, such statement overlooks the fact that war did not break out until ten days after her arrival at Manila. There is nothing in the Record to suggest that conditions at Manila prior to the outbreak of hostilities were such as to justify the requisitioning of private property by the military. Furthermore, there is also no showing that the Navy had at the time of, or even shortly after, her arrival any knowledge as to the nature of the *Capillo's* cargo. Rather does it seem likely that the authorities' first knowledge thereof was obtained on December 16, 1941, when the *Capillo* came back into the inner harbor from her outside anchorage because of her crew's unruliness and was then boarded by a Navy officer and also by an Army officer who "examined the ship's manifest" (Finding 8, p. 36, infra).

3. In two separate passages in the opinion it is suggested that refusal of permission for the *Capillo* to leave Manila was based on "the preservation of the merchant marine of the Nation" (p. 32; see also p. 31, infra). This is a mere predication, unsupported by any evidence. That her preservation would be accomplished by keeping her in an area of active hostilities seems, on its face, to be a complete *non sequitur;* and this appears to be all the more obvious from the acknowledged fact "that other merchant ships in the Manila area had been permitted to leave during the same period, some managing to reach safe havens in

Australia and elsewhere" (p. 38, infra). In short it is an illogical inference as well as one lacking any evidentiary basis.

4. In the antepenultimate paragraph of the opinion below, the following hypothetical case is posed, seemingly as a clinching argument in support of the Court's ultimate conclusion of law as to the Government's lack of liability in the instant case:

> "If, for instance, the vessel had been loaded with guns and ammunition—of definite military value—and had been ordered alongside the dock for the purpose of discharging her cargo, and then the enemy had come so close that there was not time to discharge it, and the vessel had been ordered to leave, and did leave, and succeeded in getting away, certainly in this case there would have been no taking." (p. 33, infra.)

It seems manifest, however, that since, in the hypothetical case so stated, "There was not time to discharge" the cargo and the "vessel * * * succeeded in getting away", the hypothetical owner of the guns and ammunition would not have been actually deprived of his property and certainly would not have sustained any monetary loss or damage. In short, it appears to afford still another example of inaccuracy in the line of reasoning followed in the opinon below.

Reasons for Granting the Writ

1. While, for the reason given above (p. 3, supra), we have expressed the questions here presented for review in the exact and specific "terms and circumstances of the case", it is, nonetheless,

manifest that the several principles of constitutional law here involved are by no means confined in application merely to the particular facts of the instant claims, but are of broad scope and general application. Their proper determination clearly is of great importance to all engaged in maritime commerce. Of that wide class, the immediate interests here concerned are cargo owners, both importers and also exporters; but the principles of law fundamental to a determination of their rights to just compensation clearly are not restricted in application to cargo interests only, but would also govern the rights of private shipowners. The instant case would have included a claim by such additional interests had not the *Capillo* been owned by the U. S. Maritime Commission.

The nature and characteristics of large scale modern warfare are such as to draw into its vortex civilian economic interests of wide and varied nature. In short, the direct effects of hostilities are no longer localized in their relation to commerce as, for example, was the situation during the Spanish-American and earlier Wars. Also, by reason of America's growth in stature as a World Power and its assumption of global responsibilities, our overseas trade now extends literally "even unto the ends of the earth." Such combination of factors demonstrates that situations similar, or at least analogous, to the instant situation, which arose out of World War II, must almost inevitably recur in any future wars involving this country.

A more immediate factor exists, however, of such present economic importance as to make inexpedient any postponement of a decision by this Court in the

hope that wars can, and will, be ended. Until more tangible prospects of lasting peace arise, the varied interests engaged in maritime commerce are entitled to greater certainty as to the scope of their rights under wartime conditions in order that they may govern their business transactions accordingly. As a matter of fact, it seems to be axiomatic in the business world that uncertainty alone is a disturbing factor. In the absence of an authoritative ruling by this Court, uncertainty will exist as to the important points here involved concerning the proper interpretation of the Fifth Amendment in relation to the legal effect of acts by American military and naval officers in dealing with privately owned ships and their cargoes in areas of active hostilities.

2. Moreover, in a basic sense, many aspects of the rulings in the instant case have a direct impact on other fields in addition to that of maritime commerce. One such aspect implicit here, and of wide application, is the effect of the doctrine of expectable consequences in relation to rights arising out of that part of the Fifth Amendment here involved. Heretofore the liberal principles embodied in that doctrine were deemed to be especially applicable to claims against the Government for just compensation. In the instant case, however, as already indicated above and as will also be noted below in the discussion of the incidence of the *Caltex* case (344 U. S. 149), the Court of Claims wholly excluded that doctrine and held the narrower rules of causation governing in the field of torts to be completely determinative of the Government's liability under the Fifth Amendment. This fundamental issue, relevant to ordinary "takings" of private property in general equally with those occurring under war-time conditions, is manifestly of

such importance as to call for an explicit and clarifying ruling by this Court by way of review of the decision of the Court of Claims in the case at bar.

3. Another basic issue of broad and general application which is inherent in this Court of Claims interpretation of the Fifth Amendment is the fundamental question as to what is the factor primarily determinative of a property owner's right to receive just compensation from the Government; in other words, whether the true and ultimate test is deprivation of use resulting in monetary loss to the property owner or whether it is also necessary for an actual and direct benefit to accrue to the Government in order to create any liability on its part. The former is indicated to be the correct doctrine by the recent rulings of this Court in, *inter alia, U. S.* v. *Gen. Motors Corp.*, 323 U. S. 373, 378; *U. S.* v. *Dickinson*, 331 U. S. 745; and *U. S.* v. *Kansas City Ins. Co.*, 339 U. S. 799, 810. On the other hand, the latter of the above criteria, i. e. that actual and direct benefit to the Government is a condition precedent to its liability, appears to have been adopted herein by the Court of Claims, particularly in its ruling that since the military authorities did not physically remove the goods from the vessel's hold, "the cargo was not appropriated to the use of defendant" (p. 33, infra). The confusion and uncertainty arising from the foregoing conflict should be resolved by this Court.

4. As noted above, the Court of Claims, without giving any weight whatever to the contextual elements which are the connecting links in the chain of causation in the instant case, here looked only to the final, or immediate, cause of the loss of the cargo, namely, that "it was destroyed by enemy action" (p. 33,

infra), and then ruled: "For this defendant is not liable" (p. 33, infra).

While the opinion below is barren of any citation of authority whatsoever, it would seem that, in so holding, the Court of Claims was applying the doctrine —or, at least, what it deemed to be the doctrine—underlying the decision of the majority of this Court (as then constituted) in *U. S.* v. *Caltex, Inc.*, 344 U. S. 149. In Nos. 5 and 6 of the "Questions Presented" (pp. 4-5, supra), we have outlined the several reasons why the instant case is, and should have been treated as, an exception to the *Caltex* ruling. Accordingly, we shall here merely note that the refinery there destroyed as a result of being in the area of active hostilities was a fixed object which, unlike a seagoing vessel such as the *Capillo*, could not escape from the path of the advancing enemy. It is also to be recalled that in the *Caltex* case the Army's purpose in taking over the refinery was "limited * * * to the sole objective of destroying property of strategic value to prevent the enemy from using it to wage war the more successfully" (p. 153 of 344 U. S.). As indicated on p. 5, supra, these distinctions are of such materiality and significance as to require the application to all situations possessing the characteristics presented by the case at bar, of the equitable principles on which the dissents in the *Caltex* case, supra, were based.

In short, because of the rulings made herein by the Court of Claims, this Court should take this opportunity to delineate the exact scope of the majority decision in the *Caltex* case, supra. This is all the more true and needful since that decision constitutes an exception to the general and long settled principle that, as noted by Mr. Chief Justice White in *U. S.* v. *Cohen Grocery*

Co., 255 U. S. 81, at p. 88 (see also cases there cited), war conditions do not suspend, or restrict, the constitutional right to just compensation created by the Fifth Amendment.

5. Although not so recognized by the Court below, the *Caltex* case, supra, is, however, partially relevant here as illustrative of the inevitability of destruction, or loss to the enemy, of anything of military value located, or kept, in the general area of Manila in December, 1941. In other words, it highlights the overpowering character of the desperate situation then and there existing which establishes the final, or immediate, cause of the loss of the *Capillo* cargo (i. e. enemy bombing off Corregidor on December 29, 1941) to have been a clearly expectable, and merely a natural, consequence of the actions of the military authorities in detaining the *Capillo* in the Manila area and then ordering her to anchor "just off Fort Mills" even after the military situation had deteriorated to such an extent as to call for nearby Manila to be declared an "open city" on December 24, 1951 (Finding 10, p. 36, infra).

Various decisions by this Court construing the extent of the constitutional rights conferred by the Fifth Amendment have held that a party seeking just compensation is not required to prove that the acts of the Government's agents were intended to cause the destruction of the property, but that it need only show that the cause of loss was an expectable and natural consequence of the Government's dealings with, and in relation to, the property. See, among the recent such cases, *Causby* v. *U. S.*, 328 U. S. 256; *U. S.* v. *Dickinson*, 331 U. S. 745; and *U. S.* v. *Kansas City Ins. Co.*, 339 U. S. 799, 809-810; and the earlier authorities therein cited.

The Court of Claims rulings in the instant case not merely ignore, but in effect repudiate, the doctrine and basic principles laid down by this Court in those cases as being applicable to "takings" under the Fifth Amendment. If such has become the law, it should be this Court that so states.

6. The preceding subdivisions of this heading have, we trust, indicated to some degree the importance and general interest of the several questions of law here presented as well as at least some of the reasons why the rulings of the Court of Claims are, to say the very least, unclear and open to question. It has also been noted that the opinion below contains no supporting citations whatsoever. The reason therefor may be the lack of any case in which this Court has directly passed on an analogous factual situation even though, as we view it, the rulings below are made erroneous by fundamental principles heretofore enumerated by this Court, to which reference has been made above. Obviously, however, the Court of Claims did not share such view. In other words, it apparently is possible, as is shown by the decision below, to treat the present state of the law, as laid down by this Court, as being, at the least, not positive and clear concerning the proper interpretation to be given the Fifth Amendment in circumstances such as are here presented. Particularly for the reasons above to be given, this Court should clarify any possible uncertainty in the field of constitutional law.

(i) Under Article III of the Constitution, the judicial power of the United States, which, by Section 1 thereof, is vested in this Court "and in such inferior Courts as the Congress may from time to time ordain and establish", is explicitly extended by Section 2 thereof "to all Cases, in Law and Equity, arising un-

der this Constitution." In view of those express provisions, a special obligation (even greater than its general supervisory duty as to proper administration of justice) would seem to rest upon this Court to make clear and certain that the judicial power of the United States has been corectly exercised by "such inferior Courts" in cases involving, as does the case at bar, the proper interpretation of the Fifth Amendment.

(ii) Furthermore, certiorari out of this Court to the Court of Claims affords the only means of obtaining an appellate review of this decision by that Court of first instance even though important questions of constitutional law are here involved.

Conclusion

Any one of the several reasons outlined above would alone be sufficient to justify this Court in granting the review by certiorari of the Court of Claims decision hereby sought by your petitioner, not only on its own behalf, but also on behalf of its 17 co-plaintiffs in that part of the captioned action still technically pending in the Court below.

Respectfully submitted,

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Dated: New York City, N. Y.
December 27th, 1956.

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APPENDIX A

Report of Commissioner to Court of Claims

(Filed on December 5, 1955.)

To the Honorable the Chief Judge and Associate Judges of the United States Court of Claims:

Pursuant to the order of reference in the above-entitled case, the undersigned commissioner makes the following report of his findings of fact:

1. a. This case presents for determination two claims of the Hongkong & Shanghai Banking Corporation, plaintiff (7) in the petition, for the taking by defendant of cargo belonging to plaintiff on board the *S. S. Capillo* prior to her destruction by enemy action on December 29, 1941, while at anchor off Corregidor, Philippine Islands.

b. The decision as to these two claims will be largely determinative of the claims of 17 coplaintiffs representing their losses of cargo aboard the *Capillo* as enumerated in 61 bills of lading.

c. By order of the court the issue of liability was separated from the issue of damages for trial. However, since then the parties have closed evidence on all issues and this report relates to issues both of liability and damages.

2. Plaintiff is, and at all times hereinafter mentioned was, a corporation organized and doing business under the laws of the Crown Colony of Hongkong, and registered to do business in the State of New York by its New York agency with its principal

New York office and place of business in New York City, and in the State of California by its California agency with its principal California office and place of business in San Francisco, California.

3. The laws of the Crown Colony of Hongkong permit citizens of the United States to bring suit there against the Crown Colony.

4. The *Capillo* was an American flag vessel owned by the United States Maritime Commission and chartered to the American Mail Line of Seattle for operation under and pursuant to the terms of an agreement dated March 27, 1940.

5. *S. S. Capillo* sailed from Astoria, Oregon, on or about October 18, 1941, with a cargo consisting principally of flour, canned milk, cigarettes, and lumber. The vessel was scheduled to call at Shanghai, Hongkong, Manila, Cebu, and Iloilo, in that order.

Just prior to sailing the master of the *Capillo* was advised by Navy or Coast Guard officials that the vessel's first port of call should be Honolulu rather than Shanghai. With the consent of these officials, the master communicated these instruction to American Mail Line, which directed him to proceed to Honolulu, and from that point on to follow Navy orders.

6. The *Capillo* arrived in Honolulu on or about October 27, 1941. There the master received instructions from U. S. Navy officers to proceed to Manila by way of the Gilbert and Marshall Islands, Port

Moresby, and Torres Strait. The *Capillo* sailed from Honolulu on or about October 28, 1941, and arrived in Manila on or about November 28, 1941. No cargo was discharged or loaded en route from the United States to Manila.

7. Upon arrival at Manila, the American Mail Line's Manila agent informed the *Capillo's* master, Captain Dreyer, that he was to take his orders from the United States Navy. Accordingly, Dreyer reported to U. S. Navy Commander Portz, Port Captain at Manila, for instructions. He was informed by Portz that he could not sail north or south from Manila and that the *Capillo* should remain at anchor in Manila Harbor. Early in the morning of December 8, 1941, Manila time, the master was advised by Navy officers of the outbreak of war with Japan, and was instructed to go outside the Manila Harbor and anchor. These orders were complied with, and for the next eight days the *Capillo* remained outside the harbor at various anchorages selected by the master.

8. On December 16, 1941, Dreyer moved the *Capillo* back into Manila Harbor because his crew was becoming unruly. A Navy officer boarded her in Manila Harbor and told Dreyer that immediate discharge of his cargo was desired, although nothing of a formal nature was said or done about a requisition of the cargo by military authorities. An Army officer boarding the ship the same day examined the ship's manifest and stated that the deck cargo of lumber would be useful for bridge building, but said nothing about a military requisition. On December

17 privately owned lighters operated by the Army came alongside the *Capillo* at its anchorage in Manila Harbor and commenced discharging the lumber stored on deck.

9. Discharge of the deck cargo of lumber continued through December 24, 1941, at which time all of the lumber on the afterdeck and about two-thirds of the lumber on the forward deck had been removed. During this period no cargo was removed from below deck, and the hatch covers were not opened.

10. As stated, war with Japan had broken out on December 8, Manila time. Intermittent enemy bombing and strafing of targets in Manila Harbor and port facilities had occurred. Manila was declared an "open city" by General MacArthur on or about December 24, 1941. Emergency conditions existed in Manila throughout and following this period. Supplies for the defending military forces were precariously short. Anticipated supplies had not arrived. A heavy demand existed for almost all commodities of military utility.

11. Early on the morning of December 25 the *Capillo* was ordered by the Navy to move to Fort Mills, at Corregidor, which it did, anchoring just off the Fort. On arrival, the Navy wanted the master to move the *Capillo* to Mariveles on the coast of Bataan, but desisted in its demand on the master's complaint that at Mariveles there was a gasoline-laden ship on fire as well as an ammunition dump which was a tempting target.

12. Feeling excessively vulnerable to enemy attack at his anchorage off Fort Mills, on December 28 the master requested the Navy officials at Corregidor for advice as to an anchorage more sheltered from enemy bombing. He consulted Portz, then on Corregidor, concerning this subject on the morning of December 29, and was asked by Portz if the *Capillo* could discharge its cargo on the dock at Fort Mills. On learning from the master that this could not be done because the dockside water was too shallow, Portz declared that he wanted the *Capillo's* cargo and would send lighters out to unload it at its place of anchorage. But no lighters were available, and Portz advised the master that the *Capillo* was as safe in its existing location as it would be elsewhere.

13. At or about noon on December 29, 1951, the *Capillo* was hit by two enemy bombs and set on fire. The crew abandoned the vessel and she was still burning fiercely when last seen by the master on December 31. It is safely presumed that the *Capillo* was sunk and that the cargo, documents, orders, logs, etc., were destroyed.

14. On many occasions the master requested permission of the Navy authorities for the *Capillo* to leave the Manila area, but was refused. Other merchant ships in the Manila area had been permitted to leave during the same period, some managing to reach safe havens in Australia and elsewhere. From all the evidence it is reasonable to conclude that the *Capillo* was detained in the area because the military authorities wanted much of its cargo, although there is no evidence of a distinct requisition of it beyond

the appropriation of the deckloaded lumber. The failure of the military authorities to unload the cargo with greater expedition was probably due to a shortage of unloading and warehousing facilities. Whether the *Capillo* would have avoided destruction or seizure by the enemy had it been permitted to depart from the Manila area for safer ports is conjectural.

15. Included in the underdeck cargo of the *Capillo* were 8,000 sacks of flour shipped by the Wilcox-Hayes Company from Portland, Oregon, consigned to that company's own order at Hongkong, with instructions to the carrier on the bill of lading to notify Himly, Ltd., of Hongkong, upon arrival of the shipment.

16. The flour had been invoiced by Wilcox-Hayes to Himly, Ltd., on October 6, 1941, for $14,077.45 CIF Hongkong. There is no evidence as to what the CIF Manila price would have been.

Earlier, Himly, Ltd., had established with the home office of plaintiff's bank in Hongkong an irrevocable and without recourse letter of credit to cover to flour purchase. The letter of credit having been advised to plaintiff's San Francisco branch, on October 16, 1941, Wilcox-Hayes drew a 60-day sight draft on Himly, Ltd., in the amount of $14,077.45, and was paid that amount by plaintiff in exchange for the draft and accompanying documents required by the letter of credit, including a full set of clean, on-board, blank-endorsed and freight prepaid bills of lading, signed invoices, and insurance papers. After payment of the sum to Wilcox-Hayes, plaintiff's San Francisco branch forwarded the draft and accompanying papers to its home office in Hongkong for collection from Himly, Ltd.

Appendix A

The original bill of lading was not produced in evidence and its whereabouts or existence are unknown. It cannot be determined whether the bill of lading was ultimately delivered to Himly, Ltd., along with the draft for payment, or whether they were actually received by plaintiff's home office in Hongkong. Plaintiff's New York branch has no record of payment having been made by Himly, Ltd., and it is reasonable to conclude that no payment was made.

17. The military forces of the defendant had use for flour in the Philippine Islands in December 1941.

18. There was also included in the underdeck cargo of the *Capillo* a quantity of miners' lamp calcium carbide shipped by the Stuart Oxygen Company from San Francisco, consigned to that company's own order at Manila, with instructions to the carrier on the bill of lading to notify Warner Barnes & Co., Ltd., of Manila, upon arrival of the shipment.

19. The calcium carbide had been invoiced by Stuart Oxygen Company to Warner Barnes & Co., Ltd., on October 22, 1941, for $955.99 (including a 5 percent discount), plus miscellaneous charges totaling $283.54 for wharfage and handling, special containers, insurance, and transportation to Manila.

Earlier, Warner Barnes & Co., Ltd., had established with plaintiff's Manila branch an irrevocable and without recourse letter of credit to cover the calcium carbide purchase. The letter of credit having been advised to plaintiff's San Francisco branch, Stuart Oxygen Company, on October 28, 1941, drew a 90-day

sight draft on Warner Barnes & Co., Ltd., in the amount of $1,239.53, and was paid that amount by plaintiff in exchange for the draft and accompanying documents required by the letter of credit, including a full set of clean, onboard, blank-endorsed, and freight prepaid bills of lading, signed invoices, and insurance papers. After payment of the sum to Stuart Oxygen Company, plaintiff's San Francisco branch, on October 31, forwarded the draft and accompanying papers to its Manila branch for collection from Warner Barnes & Co., Ltd. One of the three copies of the bill of lading was subsequently returned to the plaintiff.

20. The weight of the evidence fails to establish either (a) that the military authorities responsible for requisitioning supplies from ships in Manila Harbor in December 1941 were aware of the potential utility of calcium carbide as a means of illumination, or (b) that even if this potential utility was known to such authorities, there was a shortage of means of illumination, or any sort of mechanical devices available which could have been used or adapted for use as lamps operable with calcium carbide.

21. Plaintiff was reimbursed its losses by the Fireman's Fund Insurance Company and the Insurance Company of North America after execution of agreements substantially in the same form as that contained in finding 22 in the opinion of this court in *Anderson, Clayton & Company, Inc., etc.*, v. *The United States*, 129 C. Cls. 347, 363.

Respectfully submitted.

C. MURRAY BERNHARDT,
Commissioner.

APPENDIX B

Opinion of Court of Claims

(October 2, 1956)

Whitaker, *Judge,* delivered the opinion of the court:

The petition in this case is filed on behalf of the L. R. Aguinaldo, Inc., and seventeen other plaintiffs, including the Hongkong & Shanghai Banking Corporation. Only the claim of the Hongkong & Shanghai Banking Corporation is presented to the court at this time. The claims of the other plaintiffs are being held in abeyance until the claims of the Hongkong & Shanghai Banking Corporation have been decided.

All the plaintiffs had an interest in the cargo on board the *S. S. Capillo,* which was destroyed by enemy fire on December 29, 1941.

Plaintiff is a corporation organized under the laws of the Crown Colony of Hongkong, but the laws of that Colony permit citizens of the United States to bring suits against the Crown Colony.

The *S. S. Capillo* was owned by the United States Maritime Commission, but had been chartered to the American Mail Line of Seattle. It sailed from Astoria, Oregon, on or about October 18, 1941, with a cargo consisting principally of flour, canned milk, cigarettes, and lumber. It was scheduled to call at Shanghai, Hongkong, Manila, Cebu, and Iloilo, in that order. Just prior to sailing, however, the officials of the American Mail Line, in accordance with the advice of Navy or Coast Guard officials, directed the vessel to proceed first to Honolulu, and from that point on to follow the course prescribed by the Navy.

She arrived in Honolulu on October 27, 1941. The Navy charted her course from there on by way of the Gilbert and Marshall Islands, Port Moresby, and Torres Strait, and then to Manila. She arrived in Manila on October (sic) 28, 1941. Her captain reported to Commander Portz of the United States Navy, who was the Port Captain at Manila, for instructions. She was directed to remain at anchor in Manila Harbor. Her captain requested permission to proceed to Shanghai, but this request was denied, presumably because of fear of her seizure or destruction by the Japanese, who were expected to attack at any time. They did attack on December 7, 1941, about one month and ten days after her arrival in Manila.

In the meantime, her entire cargo remained on board.

Upon the outbreak of war with Japan, she was instructed to go outside the Manila Harbor and anchor. She remained outside the harbor for eight days at various anchorages selected by the master, but on December 16 she returned to the harbor because the crew was becoming unruly.

Upon her return to the harbor, a Navy officer boarded her and advised the captain that the discharge of her cargo was desired as soon as possible. An Army officer also boarded the vessel on the same day and advised the captain that the Army desired the lumber on board the vessel. On the following day lighters operated by the Army came alongside the *Capillo* at its anchorage, and took off all the lumber on the afterdeck, and about two-thirds of the lumber on the forward deck. This lumber has been paid for and is not involved in this litigation. No cargo, except the lumber, was removed.

Appendix B

On December 25, the *Capillo* was ordered by the Navy to move to Fort Mills, at Corregidor, which she did, anchoring just off the Fort. The Navy directed the master to move on to Mariveles, on the coast of Bataan, but countermanded this direction on the master's representation that there was a gasoline-laden ship on fire at this place, and there was also adjacent thereto an ammunition dump, which was a tempting target for enemy attack.

Thereafter, the master inquired if there was not some more sheltered anchorage, but was advised that the vessel was as safe where she was as at any other location.

The Port Captain asked the master if he could discharge his cargo on the dock at Fort Mills, but the master replied that the dockside water was too shallow. The Port Captain replied that he would send lighters out to unload the cargo. Before this was done, however, the *Capillo* was hit by two enemy bombs and set on fire and destroyed.

The master testified that he had requested permission to leave the Manila area on more than one occasion, but that this permission had been refused. Why it was refused, we do not know. It was, of course, the duty of the Navy to regulate the movement of all merchant ships in the way best calculated, in its judgment, to avoid the destruction or capture of the ship and its cargo by the enemy. This may have been the reason for the denial of permission to leave. On the other hand, much of the cargo of this vessel was of military value, and the Navy may have denied permission for her to leave because it wanted her cargo. However, if the latter had been the reason, it would seem she would

have been ordered to discharge her cargo shortly after arrival, instead of having been required to remain at anchor in the harbor for more than a month.

Whether the vessel would have avoided destruction or seizure by the enemy had she been permitted to leave is of course conjectural, although it is true that other merchant ships in the area had been permitted to leave, and some had managed to reach safe havens in Australia and elsewhere. At any rate, plaintiff has not shown that the reason for denial of permission to leave was for reasons other than the preservation of the merchant marine of the Nation.

The cargo of the *Capillo* consisted principally, as stated above, of flour, canned milk, cigarettes, and lumber. The lumber was wanted by the military authorities and was removed from the vessel by them, as stated, and the military authorities no doubt wanted to remove at least the flour and the canned milk, and perhaps also the cigarettes, if they could; and had they done so, they would have no doubt appropriated these articles to the use of the Army or Navy. However, they did not remove it, and, hence, there was no actual appropriation of the articles for which the Hongkong & Shanghai Banking Corporation sues.

Refusal of permission to leave the area, under the circumstances then existing, did not amount to a taking. Nor did the later notification by the Port Commander to the master that he would send lighters out to unload the vessel amount to a taking. This is so, even though the vessel's cargo was of definite military value, and probably would have been taken had the Army been able to take it.

Even a definite intention to take her cargo does not amount to a taking, unless the taking is accomplished. If, for instance, the vessel had been loaded with guns and ammunition—of definite military value—and had been ordered alongside the dock for the purpose of discharging her cargo, and then the enemy had come so close that there was not time to discharge it, and the vessel had been ordered to leave, and did leave, and succeeded in getting away, certainly in this case there would have been no taking.

The cargo was not appropriated to the use of defendant; it was destroyed by enemy action. For this defendant is not liable, even though the vessel might have escaped with her cargo, had permission to leave been granted.

The petition will be dismissed as to the claim of Hongkong & Shanghai Banking Corporation.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

(October 2, 1956)

The court, having considered the evidence, the report of Commissioner C. Murray Bernhardt, and the briefs and argument of counsel, makes the following findings of fact:

1. a. This case presents for determination two claims of the Hongkong & Shanghai Banking Corporation, plaintiff (7) in the petition, for the taking by defendant of cargo belonging to plaintiff on board

the *S. S. Capillo* prior to her destruction by enemy action on December 29, 1941, while at anchor off Corregidor, Philippine Islands.

b. The decision as to these two claims will be largely determinative of the claims of 17 coplaintiffs representing their losses of cargo aboard the *Capillo* as enumerated in 61 bills of lading.

2. Plaintiff is, and at all times hereinafter mentioned was, a corporation organized and doing business under the laws of the Crown Colony of Hongkong, and registered to do business in the State of New York by its New York agency with its principal New York office and place of business in New York City, and in the State of California by its California agency with its principal California office and place of business in San Francisco, California.

3. The laws of the Crown Colony of Hongkong permit citizens of the United States to bring suit there against the Crown Colony.

4. The *Capillo* was an American flag vessel owned by the United States Maritime Commission and chartered to the American Mail Line of Seattle for operation under and pursuant to the terms of an agreement dated March 27, 1940.

5. *S. S. Capillo* sailed from Astoria, Oregon, on or about October 18, 1941, with a cargo consisting principally of flour, canned milk, cigarettes, and lumber. The vessel was scheduled to call at Shanghai, Hongkong, Manila, Cebu, and Iloilo, in that order.

Appendix B

Just prior to sailing the master of the *Capillo* was advised by Navy or Coast Guard officials that the vessel's first port of call should be Honolulu rather than Shanghai. With the consent of these officials, the master communicated these instructions to American Mail Line, which directed him to proceed to Honolulu, and from that point on to follow Navy orders.

6. The *Capillo* arrived in Honolulu on or about October 27, 1941. There the master received instructions from U. S. Navy officers to proceed to Manila by way of the Gilbert and Marshall Islands, Port Moresby, and Torres Strait. The *Capillo* sailed from Honolulu on or about October 28, 1941, and arrived in Manila on or about November 28, 1941. No cargo was discharged or loaded en route from the United States to Manila.

7. Upon arrival at Manila, the American Mail Line's Manila agent informed the *Capillo's* master, Captain Dreyer, that he was to take his orders from the United States Navy. Accordingly, Dreyer reported to U. S. Navy Commander Portz, Port Captain at Manila, for instructions. He was informed by Portz that he could not sail north or south from Manila and that the *Capillo* should remain at anchor in Manila Harbor. Early in the morning of December 8, 1941, Manila time, the master was advised by Navy officers of the outbreak of war with Japan, and was instructed to go outside the Manila Harbor and anchor. These orders were complied with, and for the next eight days the *Capillo* remained outside

the harbor at various anchorages selected by the master.

8. On December 16, 1941, Dreyer moved the *Capillo* back into Manila Harbor because his crew was becoming unruly. A Navy officer boarded her in Manila Harbor and told Dreyer that immediate discharge of his cargo was desired, although nothing of a formal nature was said or done about a requisition of the cargo by military authorities. An Army officer boarding the ship the same day examined the ship's manifest and stated that the deck cargo of lumber would be useful for bridge building, but said nothing about a military requisition. On December 17 privately owned lighters operated by the Army came alongside the *Capillo* at its anchorage in Manila Harbor and commenced discharging the lumber stored on deck.

9. Discharge of the deck cargo of lumber continued through December 24, 1941, at which time all of the lumber on the afterdeck and about two-thirds of the lumber on the forward deck had been removed. The lumber which was removed has been paid for. During this period no cargo was removed from below deck, and the hatch covers were not opened.

10. As stated, war with Japan had broken out on December 8, Manila time. Intermittent enemy bombing and strafing of targets in Manila Harbor and port facilities had occurred. Manila was declared an "open city" by General MacArthur on or about December 24, 1941. Emergency conditions existed in Manila throughout and following this period. Supplies for the defending military forces were precari-

ously short. Anticipated supplies had not arrived. A heavy demand existed for almost all commodities of military utility.

11. Early on the morning of December 25 the *Capillo* was ordered by the Navy to move to Fort Mills, at Corregidor, which it did, anchoring just off the Fort. On arrival, the Navy wanted the master to move the *Capillo* to Mariveles on the coast of Bataan, but desisted in its demand on the master's complaint that at Mariveles there was a gasoline-laden ship on fire as well as an ammunition dump which was a tempting target.

12. Feeling excessively vulnerable to enemy attack at his anchorage off Fort Mills, on December 28 the master requested the Navy officials at Corregidor for advice as to an anchorage more sheltered from enemy bombing. He consulted Portz, then on Corregidor, concerning this subject on the morning of December 29, and was asked by Portz if the *Capillo* could discharge its cargo on the dock at Fort Mills. On learning from the master that this could not be done because the dockside water was too shallow, Portz declared that he wanted the *Capillo's* cargo and would send lighters out to unload it at its place of anchorage. But no lighters were available, and Portz advised the master that the *Capillo* was as safe in its existing location as it would be elsewhere.

13. At or about noon on December 29, 1941, the *Capillo* was hit by two enemy bombs and set on fire. The crew abandoned the vessel and she was still

burning fiercely when last seen by the master on December 31. It is safely presumed that the *Capillo* was sunk and that the cargo, documents, orders, logs, etc., were destroyed.

14. On many occasions the master requested permission of the Navy authorities for the *Capillo* to leave the Manila area, but was refused. Other merchant ships in the Manila area had been permitted to leave during the same period, some managing to reach safe havens in Australia and elsewhere. It is probable that the *Capillo* was detained in the area because the military authorities wanted much of its cargo, but there was no requisition of it beyond the appropriation of the deckloaded lumber. The failure of the military authorities to unload the cargo was probably due to a shortage of unloading and warehousing facilities. Whether the *Capillo* would have avoided destruction or seizure by the enemy had it been permitted to depart from the Manila area for safer ports is conjectural.

15. [On the Court's own motion, this Finding was "stricken in its entirety with finding 16 to be renumbered as finding 15", per the order of the Court of Claims (infra, p. 46), dated December 5, 1956.]

15. (16.) In 1944 plaintiff was reimbursed its losses by the Fireman's Fund Insurance Company and the Insurance Company of North America after execu-

tion of agreements reading in part, respectively, as follows:

> Supplementing the subrogation receipt executed by the undersigned with respect to the property referred to below, the undersigned agree that the sum received from the FIREMAN'S FUND INSURANCE COMPANY and acknowledged in said receipt has been advanced by the insurance company and received by the undersigned without prejudice to the question whether the said property was lost while insured under a policy issued by the said insurance company and as a result of perils insured against under the said policy. The said advance has been made by the insurance company for the purpose of putting the undersigned in funds pending ascertainment of the circumstances of the loss and determination of the question of liability, and the undersigned agree to return the amount of the said advance unless the said merchandise was lost by a peril against which the said insurance company insured it at the time of the loss.
>
> * * * *
>
> Supplementing the subrogation receipt executed by the undersigned with respect to the property referred to below, the undersigned agree that the sum received from Insurance Company of North America and acknowledged in said receipt has been advanced by the insurance company and received by the undersigned without prejudice to the question whether the said property was

lost while insured under a policy issued by the said insurance company and as a result of perils insured against under the said policy. The said advance has been made by the insurance company for the purpose of putting the undersigned in funds pending ascertainment of the circumstances of the loss and determination of the question of liability, and the undersigned agree to return the amount of the said advance unless the said merchandise was lost by a peril against which the said insurance company insured it at the time of the loss.

* * * *

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff Hongkong and Shanghai Banking Corporation is not entitled to recover, and its petition is dismissed.

APPENDIX C

Plaintiffs' Motion to Amend the Court's Findings of Fact

Plaintiffs move pursuant to Rules 53 and/or 54(a), that the Court amend its findings of fact in the following respects:

The Court, in making its Findings of Fact, failed to make any Findings in respect of the subject matter covered by Commissioner Bernhardt's Findings 15 through 19. This appears to have been an oversight since as its Finding 15 the Court adopted without change Commissioner Bernhardt's Finding 20, and the latter is intelligible only in conjunction with the omitted findings. Plaintiffs, therefore, respectfully move that the Court amend its Findings of Fact by adopting Commissioner Bernhardt's Findings 15 through 19 as the Court's Findings 15 through 19 and by renumbering the Court's Findings 15 and 16.

The omitted findings, which are set forth below for convenient reference, deal with the nature, invoice cost and mechanics of the shipments in respect of which suit was filed, plus a finding that defendant had use for flour in the Philippines in 1941. No exception was taken to them by either party.

The additional findings sought by this motion to be made a part of the Court's Findings of Fact are as follows:

"15. Included in the underdeck cargo of the Capillo were 8,000 sacks of flour shipped by the Wilcox-Hayes Company from Portland, Oregon,

consigned to that company's own order at Hongkong, with instructions to the carrier on the bill of lading to notify Himly, Ltd., of Hongkong, upon arrival of the shipment.

16. The flour had been invoiced by Wilcox-Hayes to Himly, Ltd., on October 6, 1941, for $14,077.45 CIF Hongkong. There is no evidence as to what the CIF Manila price would have been.

Earlier, Himly, Ltd., had established with the home office of plaintiff's bank in Hongkong an irrevocable and without recourse letter of credit to cover the flour purchase. The letter of credit having been advised to plaintiff's San Francisco branch, on October 16, 1941, Wilcox-Hayes drew a 60-day sight draft on Himley, Ltd., in the amount of $14,077.45, and was paid that amount by plaintiff in exchange for the draft and accompanying documents required by the letter of credit, including a full set of clean, on-board, blank-endorsed and freight prepaid bills of lading, signed invoices, and insurance papers. After payment of the sum to Wilcox-Hayes, plaintiff's San Francisco branch forwarded the draft and accompanying papers to its home office in Hongkong for collection from Himly, Ltd.

The original bill of lading was not produced in evidence and its whereabouts or existence are unknown. It cannot be determined whether the bill of lading was ulti-

mately delivered to Himly, Ltd., along with the draft for payment, or whether they were actually received by plaintiff's home office in Hongkong. Plaintiff's New York branch has no record of payment having been made by Himly, Ltd., and it is reasonable to conclude that no payment was made.

17. The military forces of the defendant had use for flour in the Philippine Islands in December 1941.

18. There was also included in the underdeck cargo of the Capillo a quantity of miners' lamp calcium carbide shipped by the Stuart Oxygen Company from San Francisco, consigned to that company's own order at Manila, with instructions to the carrier on the bill of lading to notify Warner Barnes & Co., Ltd., of Manila, upon arrival of the shipment.

19. The calcium carbide had been invoiced by Stuart Oxygen Company to Warner Barnes & Co., Ltd., on October 22, 1941, for $955.99 (including a 5 percent discount), plus miscellaneous charges totaling $283.54 for wharfage and handling, special containers, insurance, and transportation to Manila.
Earlier, Warner Barnes & Co., Ltd., had established with plaintiff's Manila branch an irrevocable and without recourse letter of credit to cover the calcium carbide purchase. The letter of credit having been advised to

plaintiff's San Francisco branch, Stuart Oxygen Company, on October 28, 1941, drew a 90-day sight draft on Warner Barnes & Co., Ltd., in the amount of $1,239.53, and was paid that amount by plaintiff in exchange for the draft and accompanying documents required by the letter of credit, including a full set of clean, onboard, blank-endorsed, and freight prepaid bills of lading, signed invoices, and insurance papers. After payment of the sum to Stuart Oxygen Company, plaintiff's San Francisco branch, on October 31, forwarded the draft and accompanying papers to its Manila branch for collection from Warner Barnes & Co., Ltd. One of the three copies of the bill of lading was subsequently returned to the plaintiff."

Respectfully submitted,

WATTERS & DONOVAN
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MARTIN P. DETELS
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JOSEPH J. MAGRATH, 3RD
Of Counsel

Appendix C

Defendant's Answer to Plaintiffs' Motion to Amend Findings of Fact

Plaintiffs in this case call attention to the fact that the Court failed to include in its findings of fact the material found by the Commissioner in his findings 15 through 19. Defendant can find no reason in the record for the omission of these findings and, as plaintiffs point out, the Commissioner's finding 20, adopted by the Court as its finding 15, is so closely connected with the Commissioner's findings 18 and 19 as to make it almost meaningless without them. The only conclusion that can be drawn in these circumstances is that the omission of these findings was inadvertent.

Defendant accordingly interposes no objection to the amendment requested by plaintiffs, if the Court deems it appropriate that it be made.

Respectfully submitted,

George Cochran Doub
Assistant Attorney General
Civil Division

Kendall M. Barnes
Attorney, Civil Division
Department of Justice

Appendix C

COURT OF CLAIMS ORDER ON PLAINTIFFS' MOTION

(December 5, 1956)

This case comes before the court on plaintiffs' motion pursuant to Rule 53 to amend the findings of fact entered October 2, 1956, and defendant's response thereto. Upon consideration thereof

IT IS ORDERED THIS FIFTH DAY OF DECEMBER, 1956, that plaintiffs' motion be and the same is denied, and

IT IS FURTHER ORDERED that finding 15 be and the same is stricken in its entirety with finding 16 to be renumbered as finding 15.

BY THE COURT

MARVIN JONES
Chief Judge

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414127—57

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 659

L. R. AGUINALDO, INC., ET AL.

INCLUDING

HONGKONG & SHANGHAI BANKING CORPORATION,

PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. B, pp. 29–40) is not yet reported.

JURISDICTION

The decision of the Court of Claims, dismissing the petition of Hongkong & Shanghai Banking Corporation, was entered on October 2, 1956 (Pet. App. B, p. 29). The petition for a writ of certiorari was filed on December 28, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether petitioner's property, part of the below-deck cargo of the S. S. *Capillo,* and not requisitioned, appropriated or used by the United States, had been "taken" by the United States prior to its destruction on December 29, 1941, off Fort Mills in the Philippine Islands, when the *Capillo* was sunk as a result of bombing by the Japanese.

STATEMENT

By suit filed in the Court of Claims, petitioner, along with seventeen other claimants, sought to recover just compensation for the alleged taking by the United States of their property, the below-deck cargo of the S. S. *Capillo,* which was sunk on December 29, 1941, by Japanese bombs off Fort Mills, in the Philippine Islands. The Court of Claims dismissed the petitioner's complaint on the ground that "[t]he cargo was not appropriated to the use of [the United States]; it was destroyed by enemy action" (Pet. App. B, p. 33).[1] The facts as found by the Court of Claims may be summarized as follows:

The S. S. *Capillo,* an American Mail Line vessel,[2] sailed from Oregon on October 18, 1941, with a cargo consisting principally of lumber on deck, and flour, canned milk, and cigarettes below deck. The ship was originally scheduled to call at various ports in the Far East. However, just prior to sailing, the *Capillo*

[1] The seventeen other claims were held in abeyance pending the Court of Claims' decision on petitioner's claim.

[2] The *Capillo,* owned by the United States Maritime Commission, had been chartered to the American Mail Line of Seattle (Pet. App. B, p. 34).

was directed by American Mail Line officials, upon advice received from the Navy or Coast Guard, that the ship's first port of call should be Honolulu, and from that point on to follow Navy orders. (Pet. App. B, pp. 34–35).

The *Capillo* arrived in Honolulu on or about October 27, 1941, and there received instructions from the Navy to proceed to Manila. The ship arrived in Manila on or about November 28, 1941, not having discharged or loaded any cargo since leaving the United States. At Manila, the American Mail Line's agent again informed the *Capillo's* master, Captain Dreyer, that he was to take orders from the Navy. Commander Portz, the Port Captain at Manila, advised Dreyer that he could not sail north or south from Manila because of uncertain conditions then existing, and that the *Capillo* should remain at anchor in Manila Harbor. On December 8, 1941, Captain Dreyer was advised by the Navy of the outbreak of war with Japan, and the *Capillo,* like numerous other ships at Manila, was ordered to move outside the Manila Harbor and anchor. Complying with those orders, Captain Dreyer kept the *Capillo* for the next eight days at various anchorages which he selected outside the harbor. (Pet. App. B, pp. 35–36).

Because his crew was becoming unruly, Captain Dreyer returned the *Capillo* to Manila Harbor on December 16, 1941. A Navy officer then boarded the ship and told Dreyer that immediate discharge of his cargo was desired. Nothing of a formal nature was said or done about a requisition of the cargo by military authorities. An Army officer also boarded the

vessel the same day, examined the ship's manifest and stated that the deck cargo of lumber would be useful for bridge building. The next day lighters operated by the Army came alongside the *Capillo* and began discharging the lumber stored on deck. Discharge of the deck cargo of lumber continued through December 24, 1941.[3] During this period no cargo was removed from below deck and the hatch covers were not opened. (Pet. App. B, p. 36.)

On December 25, 1941, the *Capillo* was ordered by the Navy to move to Fort Mills, at Corregidor, which it did, anchoring at a point just off the Fort. The Navy then wanted Captain Dreyer to move on to Mariveles, on the coast of Bataan, but desisted in its demand when Dreyer complained that there was greater danger for his ship there. (Pet. App. B, p. 37). Nothing was said or done about the cargo still remaining on board, and the *Capillo* continued at its anchorage at Fort Mills.

On December 28, Captain Dreyer requested the Navy officials at Corregidor for advice as to an anchorage more sheltered from enemy bombing. The following day, December 29, he consulted Port Captain Portz, then on Corregidor, concerning this subject. At that time, Portz asked Dreyer if the *Capillo* could discharge its cargo on the dock at Fort Mills. On learning that the dockside water was too shallow for the *Capillo,* Portz stated that he wanted the cargo and would send lighters out to unload it at its place of

[3] This lumber has been paid for and is not involved in this litigation.

anchorage. But no lighters were available, and Portz then advised Dreyer that the ship was as safe in its existing location as it would be elsewhere at that time. (Pet. App. B, p. 37).

About noon of the same day, December 29, while still at its anchorage off Fort Mills with all of the below-deck cargo on board, the *Capillo* was hit and presumably sunk by enemy bombs (Pet. App. B, p. 38).

ARGUMENT

Petitioner apparently recognizes that the United States could not be held liable, under the Fifth Amendment, for the loss of the cargo on board the *Capillo* if that loss occurred solely as a result of the Navy's guiding the movements of the *Capillo* in the furtherance of general military activities (see Pet. 7). *Omnia Commercial Co.* v. *United States,* 261 U. S. 502; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146; *Aleutian Livestock Co.* v. *United States,* 119 C. Cls. 326, *certiorari denied,* 342 U. S. 875; see also *Knox* v. *Lee,* 12 Wall 457, 551.

Petitioner urges, however, that the property loss incurred in this case is compensable under the Fifth Amendment on the ground that, prior to the sinking of the *Capillo* by Japanese bombs, the United States had "taken" the cargo by virtue of certain governmental actions directed specifically at the *Capillo* and its cargo, *i. e.,* ordering the *Capillo* to proceed to Fort

Mills, at Corregidor;[4] a statement by an unidentified naval officer, in one instance, that "immediate discharge of the cargo was desired" (Pet. App. B, p. 36); and a statement by Port Captain Portz, in another instance, that "he wanted the *Capillo's* cargo and would send lighters out to unload it at its place of anchorage" (Pet. App. B., p. 37). Those actions, deemed insufficient by the Court of Claims to impose liability upon the United States under the Fifth Amendment, fall far short of any governmental action of the kind which this Court has held to constitute a "taking."

Petitioner points to no case where, merely on the basis of expressions of an intention to take certain property, absent any direct invasion of that property interest, the United States was held to have taken the property involved.[5] Petitioner relies upon three cases (*United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Dickinson*, 331 U. S. 745; *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799) as establishing the "correct doctrine" (Pet. 16)

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[4] Petitioner suggests that the reason for the *Capillo* being ordered to Fort Mills was for the purpose of discharging her cargo there (Pet. 3). However, neither the Commissioner nor the Court of Claims made any such finding. The direction to proceed to Fort Mills, therefore, was at least equally consistent with a military need for the vessel, and protection thereof, as it was with a military need for the cargo.

[5] Rather, this Court has required that there be some positive invasion of the property. See, *e. g.*, *United States* v. *Causby*, 328 U. S. 256; *Portsmouth Co.* v. *United States*, 260 U. S. 327; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546; *United States* v. *Welch*, 217 U. S. 333.

within which its claim for compensation should be determined, *i. e.*, "deprivation of use resulting in monetary loss" (*Ibid.*). But in each of those cases there was no question as to whether there had been a direct invasion of the property involved. In the *General Motors Corp.* case, the Government had physically occupied the claimant's warehouse; and in both the *Dickinson* and *Kansas City Ins. Co.* cases the claimants' lands were flooded as a result of governmental action. In this case, there was no similar invasion of petitioner's property since it was neither disturbed, appropriated, nor used by the Government. Exercising control over the ship in order that it might later be determined what portion of the cargo would be needed and could be appropriated does not constitute a requisition of the cargo for which the Government is obliged to pay compensation.

In *Anderson, Clayton & Co., Inc.* v. *United States*, 129 C. Cls. 347, the cargo on board a ship, similarly caught in the Philippines during the early days of World War II, had been successfully unloaded and stored in a warehouse by the military. Physical control over the cargo was exercised to the extent that the ship's agent was denied access to the warehouse. Finding that the military wanted to conserve the cargo so that such parts of it as were of military use would be available when needed, the Court of Claims held that the control was reasonable in those circumstances, and that the property, therefore, had not been taken by the Government. *A fortiori*, petitioner's property, not having been either unloaded or

stored by the military, cannot be said to have been taken by the Government.

While petitioner asserts that there was an intention to use its property (8000 sacks of flour and calcium carbide for miners' lamps), the facts are fully consistent with a purpose of protecting American property from being destroyed and even of preventing such property from falling into enemy hands. If for military purposes the latter had become necessary, the United States would not be liable. *United States* v. *Caltex (Philippines), Inc.*, 344 U. S. 149. But there is no need, in any event, to speculate as to the intentions of the military officers, if, indeed, there were any firm intentions. As stated by the Court of Claims in another "taking" case where the military was alleged to have appropriated certain other cargo in the Philippines (*Hongkong & Shanghai Banking Corp.* v. *United States*, 133 C. Cls. 753, at 757):

> The burden is on the plaintiff to show that the Army did appropriate it to its own use, and the difficulty of carrying that burden is another one of the fortunes of war. We cannot hold the Government liable on the theory of probabilities.

Nor can a taking be predicated on the fact that in the extreme situation then existing in the Philippines the Navy was unable to advise the master of a more sheltered anchorage from enemy bombing.[6] "This

[6] Petitioner seems to argue that because the *Capillo* was refused permission to leave the Manila area while some other ships were permitted to leave during that same period (Pet. App. B, p. 38) the United States must bear the subsequent loss of the *Capillo's* cargo. Petitioner assumes, of course, that absent Gov-

Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign". *Caltex, supra,* at 155–156. Lacking, therefore, any positive invasion of its property by the Government, petitioner's claim for compensation was properly dismissed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1957.

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ernment intervention the *Capillo* would have arrived at a safe haven, cargo intact. This flies in the face of the court's specific finding that "[w]hether the *Capillo* would have avoided destruction or seizure by the enemy had it been permitted to depart from the Manila area for safer ports is conjectural" (Pet. App. B, p. 38).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

L. R. AGUINALDO, INC., *et al.*,
including
HONGKONG & SHANGHAI BANKING CORPORATION,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF ON BEHALF OF PETITIONER

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REPLY BRIEF ON BEHALF OF PETITIONER

Introductory Statements

Because of our intimate knowledge of all the ramifications of the factual and legal issues here involved, we have read Respondent's brief with great interest, not so much, however, for what it states explicitly as for what it omits to mention.

Counsel for the Respondent do not gainsay the prime and general importance of the several broad

questions of constitutional law here involved to the various interests concerned with maritime commerce and in other fields as well; but merely attempt to support the ultimate result of the rulings by the Court below here sought to be reviewed. To this end, they condense the various issues of law into one general question as to (p. 2) "whether petitioner's property * * * had been 'taken' by the United States prior to its destruction on December 29, 1941 off Fort Mills in the Philippine Islands, when the *Capillo* was sunk as a result of bombing by the Japanese."[1] They then, in an attempt to attempt to support the negative answer reached by the Court of Claims, base their argument on the proposition that to constitute a "taking" there must be a physical seizure of the property and its tangible appropriation to a definite consuming use.

Discussion of *The Minden*, 1942 A. C. 50 (H. L.)

Before discussing the authorities which opposing counsel seem to consider as establishing such proposition, we would refer this Court to *The Minden-Robertson* v. *Forestal Land, etc., Co., Ltd.*, 1942 A. C. 50, aff'g (1941) 1 K. B. 225 (C. A.), a decision by the House of Lords which not only clearly demonstrates that the presence of physical force is not requisite to a "taking" in the nature of a restraint of princes, but, in other respects, also affords a very close and illuminating analogy to what petitioner submits to be the correct set of legal principles here determinate.

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[1] By so stripping down "the question presented" to such basic form, it becomes no more truly representative of the complex of legal issues here to be reviewed than the backbone alone is representative of a woman's skeleton.

The Minden, supra, was an action on a war risk policy insuring cargo in course of carriage from Buenos Aires to Durban on a German vessel in August-September, 1939, against loss by (p. 53 of 1942 A. C.) "takings at sea, * * * restraints and detainments of all kings, princes and people * * * and of all other" like perils. In accordance with standing orders of the German Government, the vessel first deviated to a neutral port on the eve of World War II and a few days after its outbreak sailed therefrom in an attempted run to Germany. While so en route, (p. 56) "in the presence of a British warship, she was scuttled by those on board off the Faroe Islands, and was lost with all her cargo, including the insured goods". Without dissent, the judgment of the Court of Appeal (1941—1 K. B. 225), holding the war risks underwriters liable was affirmed in the House of Lords.

In the course of his speech, Lord Wright pointed out that the initial taking of the assured's goods was merely by the Master's (p. 80 of 1942 A. C.) "dealing with them adversely to their interests and throwing off the role of a private carrier in which capacity he had held them up to then as a bailee for the assured" and that clearly (p. 80) "a restraint may operate without any display of force".

In addition to the several English authorities discussed by Lord Wright (pp. 80-81 of 1942 A. C.) on this latter point, reference may be made to the American case of *Fifield* v. *Insurance Co.*, 47 Pa. 166, at p. 176, to the effect that the words "capture" and "seizure" are not restricted to the operation of external force.

Analogy Afforded by *The Minden*, supra

Of even more direct interest as affording an illuminating legal analogy to the instant case are the fundamental principles on which the liability of the war risks underwriters was based in *The Minden*, supra, both in the Court of Appeal and in the House of Lords. The essentials of the line of reasoning which led those Courts to the ultimate conclusion as to liability are (1st) that a constructive total loss of the goods occurred when the vessel with the insured cargo still on board changed from her commercial voyage to a new voyage from the neutral port back to Germany dictated by the orders of the German Government and (2nd) that such constructive total loss to the assured matured or (p. 111 of 1942 A. C.) was "converted into an actual total loss" by a war peril when (p. 56 of 1942 A. C.) "in the presence of a British warship, she was scuttled * * * and was lost with all her cargo, including the insured goods". See, in particular, the speeches of Viscount Simon at p. 64, of Lord Wright at pp. 79-81, and of Lord Porter at pp. 111-112 of 1942 A. C.

Only a slight paraphrasing of those principles of law is needed to make them apposite here. In short, in the case at bar there was a constructive taking of the cargo (i. e. meaning, in this type of case, a transfer from the owner to the Government of the risk of its loss from expectable, causal consequences of the acts constituting the constructive taking) when, on account of the military need for her cargo, the *Capillo* was not permitted to leave the area of hostilities as other merchant vessels were allowed to do (Finding 14,

App. B, p. 38 of Petition) or at least when, completion of discharge of her deck cargo of lumber being interrupted[2] by Manila being declared an "open city", she was thereupon ordered by the U. S. Naval authorities to proceed with the balance of her lumber cargo and all her under-deck cargo to an anchorage off Corregidor where, at the time of the loss, she was waiting for lighters into which to discharge the cargo which Commander Portz, U. S. N., had "declared that he wanted". (Finding 12, App. B, p. 37 of Petition.)

The constructive "taking" (i. e. transfer of risk of loss from expectable consequences) was still clearly operative when it was turned into an actual total loss of the cargo as a result of the *Capillo* being hit by enemy bombs while still at the anchorage off Corregidor (Finding 13, App. B, p. 25 of Petition), i. e. was converted into a "taking" within the meaning of the Fifth Amendment by the cargo owner's becoming irretrievably deprived of their property by reason of a natural and expectable consequence of the earlier "constructive" taking.

Discussion of Cases Cited by Respondent

None of the cases cited by Respondent's counsel afford true support for the decision here sought to be reviewed.

The cases cited on p. 5 of Respondent's brief not only are in no way in point, but only, at best, relate to a "straw man". Petitioner did not below, and does not now, base any part of its case upon "the

[2] The lumber actually discharged was later paid for by the Government. (Finding 9, App. B, p. 36 of Petition.)

Navy's guiding the movements of the *Capillo* in the furtherance of general military activities" (p. 5 of Respondent's brief). We tried to make this clear by the second paragraph on p. 7 of the Petition.

1. Aleutian Livestock Case

The *Aleutian Livestock Case*, 119 Ct. Cls. 326,[3] the most recent of the line of cases cited by opposing counsel in connection with the foregoing, is clearly distinguishable by the explicit language in Judge Whitaker's opinion where he stressed at p. 343 that "the evacuation order", on which that claim for a "taking" was based, "did not apply to plaintiff's employees alone; it was directed to all civilians on Unmak Island". In the case at bar, all the orders on which the instant claim for a "constructive taking" is based were specifically directed to the *Capillo* and her cargo alone and singled them out for exposure to war risks which other vessels and their cargoes were allowed to escape.

2. The American Leader Case

This is made all the more clear by the finding in the *S. S. American Leader (Hongkong & Shanghai*

[3] This and two of the other cases mainly relied upon by Respondent to support its contentions that the opinion below was correct are cases recently decided by the Court of Claims, then consisting of the same members as sat in the instant case, with all three opinions written by Judge Whitaker, who wrote the opinion here sought to be reviewed. It is suggested that if such decisions are to be deemed to be in any way in point, they then demonstrate that the errors below are not an exception in the application of proper legal principles, but demonstrate a fixed misconception on the part of the Court of Claims of the correct doctrine to be applied to Fifth Amendment "takings" under wartime conditions.

Banking Corp. v. *U. S.*, 133 Ct. Cls. 753), cited on p. 8 of Respondent's brief, that (at p. 756)

> "the Port Director, on December 11, 1941, notified all vessels in the harbor that they could either leave that night and try to reach a safe port, or face the alternative of remaining in the port of Manila indefinitely. It was then that the master of the *American Leader* asked permission to remain until after its cargo was fully discharged; but this permission was denied, and the vessel proceeded to Australia, where it discharged the balance of the tinplate." (p. 756 of 133 Ct. Cls.)

Incidentally, it might be noted that the following sentence completes the quotation from the Court's opinion in that case as set forth on p. 8 of Respondent's brief:

> "We must have some proof either direct or circumstantial to show, not what the Army probably did, but what it actually did."

The prior sentences of that paragraph of Judge Whitaker's opinion, i. e. the part quoted on behalf of Respondent, stated that a petitioner bears the burden of proving an appropriation of property and that "we cannot hold the Government liable on the theory of probabilities." (p. 757 of 133 Ct. Cls.)

Our submission is that this latter criterion of certainty should not be applied in cases such as that and the one at bar which have combat operations as a backdrop. It seems unrealistic for a Court to require officers of the armed services, in the face of the shock and confusion of the outbreak of active hostilities, to observe the amenities of giving proper receipts

and of serving written requisitions couched in technical phraseology. Compare Judge Mayer's apt description of Captain Nott's attitude as a maritime expert in *The Mary T. Tracy*, 298 Fed. 528, at p. 530.

3. Anderson Clayton Case

The third of the Court of Claims decisions relied upon here (p. 7 of Respondent's brief) by opposing counsel is *Anderson, Clayton & Co., Inc.* v. *U. S.*, 129 U. S. 347. Basically, that decision is inapplicable and distinguishable for the same reasons which make the majority decision in *U. S.* v. *Caltex, Inc.*, 344 U. S. 149, invalid in application to the case at bar. (Please see pp. 16-18 of Petition.) In addition, it is clearly distinguishable by the further finding therein that there "the control exercised by" Colonel Cook, U. S. A., "over the cargo was merely to prevent the dispersal of these products before he had had an opportunity to determine which, if any, were of any use to him in his supply operations." Accordingly, the Court's ultimate holding was merely

> "that the defendant is liable for all parts of the cargo which it in fact appropriated to its own use, but it is not liable for that part which it did not appropriate to its own use and which was either destroyed when it was in imminent danger of capture by the enemy forces, or which was taken by the native population, with Colonel Cook's permission, when it was in imminent danger of capture by enemy forces." (p. 352 of 129 Ct. Cls.)

Obviously, such a holding is wholly irrelevant to the completely different factual situation presented by the case at bar.

Conclusion

We again urge that a writ of certiorari should issue out of this Court to the Court of Claims for a review of the decision below dismissing your petitioner's claim which otherwise will also become effective in respect of the claims of the seventeen co-plaintiffs in this suit.

Respectfully submitted,

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Dated: New York City, N. Y.
January 29, 1957.